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Supreme Court, U.S.
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No. 96-33

In The

Supreme Court of the United States

October Term, 1995

HILLEL CHODOS,

Petitioner,

v.

SHOP TELEVISION NETWORK, INC.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The Court of Appeals held that neither Bankruptcy Code § 349 nor considerations of judicial economy, convenience, fairness and comity require dismissal of a bankruptcy court's order to return funds which had been paid by the debtor to Petitioner as an advance on the eve of the debtor's bankruptcy filing. Should the Court review the Court of Appeal's decision, given that:

(1) The decision does not conflict with any decision of any other federal circuit or any state circuit of last resort;

(2) The decision raises no substantial federal issue;

(3) The decision is in conformance with the strong federal policy to protect creditors and debtors against overreaching attorneys; and

(4) The decision is unpublished and may not be cited as precedent in the Ninth Circuit.

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STATUTORY PROVISIONS

The constitutional and statutory provisions involved in the case are not accurately set out in the Petition as required by Rule 14.1(f). This case does not involve the U.S. Constitution, Article I, Section 8, Clause 4. Nor does this case involve 28 U.S.C. § 1334(b), except to the extent that it originally provided the bankruptcy court with jurisdiction.

The statutes involved in this case are 11 U.S.C. §§ 329 and 349. The provisions of these statutes are set forth at pages A39-A40 of the Appendix to the Petition. Rule 2017(a) of the Federal Rules of Bankruptcy Procedure is also involved in this case and provides:

> On motion by a party-in-interest or on the court's own initiative, the court after notice and a hearing may determine whether any payment of money or any transfer of property by the debtor, made directly or indirectly and in contemplation of the filing of a petition under the Code by or against the debtor or before entry of the order for relief in an involuntary case to an attorney for services rendered or to be rendered is excessive.

STATEMENT OF THE CASE

This Petition is by Hillel Chodos ("Chodos"), an attorney who represented Respondent Shop Television Network, Inc. ("STN") in a state court civil proceeding ("State Lawsuit"). Chodos was paid a large retainer on the eve of STN's bankruptcy filing, failed to have his employment approved by the bankruptcy court and

refused to return the advance of approximately $300,000 when ordered to do so. The statutory provisions referenced above were designed to protect against just such overreaching by an attorney in the bankruptcy court.

Within one year prior to the commencement of STN's bankruptcy case, STN paid to Chodos in excess of $290,000 in attorneys' fees and costs for representing STN in the State Lawsuit. While the State Lawsuit was pending, STN filed a voluntary petition under Chapter 11. Two days before filing its bankruptcy petition, STN delivered to Chodos an additional check in the amount of $283,498.38, which was paid one day after the petition was filed. The $283,498.38 was an *advance* for any *future* legal services necessary to prosecute the State Lawsuit. Chodos sought and took the advance because he erroneously thought that by doing so he could avoid having to file fee applications with the bankruptcy court.

Because STN had filed for bankruptcy, Chodos was required to have the bankruptcy court approve his representation of STN in the State Lawsuit. In aid of his application for that approval, Chodos told the bankruptcy court and STN that, if the bankruptcy court did not approve Chodos' postpetition employment, Chodos would return the $283,498.38 to STN.

The bankruptcy court did not approve Chodos' application because he refused to keep time records and his hourly rates were $750 to $1,000 per hour. However, despite STN's request and Chodos' promise to return the

$283,498.38 if his application were denied, Chodos refused to return the funds to STN.

STN then commenced an adversary proceeding against Chodos in the bankruptcy case to recover the $283,498.38 advance paid by STN to Chodos. Based on § 329 of the Bankruptcy Code and Federal Rules of Bankruptcy Procedure Rule 2017, STN moved for an order requiring the return of excessive compensation, including the $283,498.38 paid to Chodos just two days before STN commenced its bankruptcy case. The bankruptcy court granted the motion and ordered Chodos to return the $283,498.38 to STN. The order was subsequently stayed pending appeal.

During the pendency of its bankruptcy case, STN settled its claims in the State Lawsuit, which enabled STN to pay in full the prepetition claims of all of its creditors and administrative expenses incurred during STN's bankruptcy case. As a result, the bankruptcy court entered an order authorizing voluntary dismissal of STN's bankruptcy case, while specifically retaining jurisdiction "with respect to any disputes which have arisen or may have arisen between the Debtor and the Creditors or other parties-in-interest with respect to the satisfaction of the respective claims, including, but not limited to, any and all fee applications as well as any pending litigation by the Debtor to recover monies allegedly due the Debtor." (Petition, A4-A7.)

Although irrelevant to the Petition, Chodos claims that STN has since gone out of business. (Petition, p. 7.) STN, however, still has a Board of Directors and the officers and directors are engaged in preserving the value

of its assets, prosecuting and defending suits by or against it, adjusting and winding up business and affairs and distributing its assets in accordance with its plan of liquidation. Thus, it has a substantial interest in recovering the funds owed to it by its former attorney.

Chodos also implies that the $283,498.38 was paid to him for services already rendered, and that STN's claim for refund of his advance is still in the "pleading stage" in the bankruptcy court and only involves application of state law. (Petition, pp. 5-6.) In fact, Chodos admitted in the bankruptcy court that this payment was for future, not past, legal services; the bankruptcy court already determined that the $283,498.38 in fees paid by STN on the eve of STN's bankruptcy filing were excessive and related to the bankruptcy, and the court ordered its return pursuant to § 329. Indeed, because Chodos did not oppose the § 329 motion, the bankruptcy court's determination that the $283,498.38 payment was excessive is not at issue. All that remains is for the bankruptcy court's order to return the fees to become final so that it can be enforced.[1]

Chodos has tried to use the dismissal to avoid the order requiring him to pay the $283,498.38. However, the

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[1] STN has other claims pending in the adversary proceeding for violation of provisions of the Bankruptcy Code, as well as state common law claims, which have been stayed pending the appeal of the § 329 order. Thus, even the remaining claims are not the garden variety state law claims Chodos has represented them to be. Indeed, the bankruptcy court is in the best position to adjudicate the claims pursuant to the Bankruptcy Code, as well as state law claims based on the same set of facts.

district court refused to vacate the § 329 order and dismiss the adversary proceeding for lack of jurisdiction, holding that the bankruptcy court's retention of jurisdiction was "entirely appropriate." (Petition, A8-A10.) Instead, the district court affirmed the § 329 order. (Petition, A8-A32.) The court of appeal then affirmed in an unpublished decision. (Petition, A24-A37.)

SUMMARY OF ARGUMENT

First, Chodos does not offer any reason why this Court should review this case under the guidelines of Supreme Court Rule 10. Chodos does not contend that there is (1) any conflict with a decision of another court of appeals or state court of last resort, (2) any basis for the exercise of this Court's supervisory power or (3) any important question of federal law. To the contrary, having failed to eliminate the bankruptcy judge on the grounds of bias and prejudice, and having failed to challenge the ability of the bankruptcy court to retain jurisdiction over the § 329 order on the grounds provided under settled law, Chodos asks this Court to throw out the discretion given to bankruptcy courts and announce an inflexible rule that is contrary to established law and policy.

Second, Chodos fails to address the basis for the court of appeals decision. Indeed, his arguments, which are raised for the first time with this Court, have little, if anything to do with this case.

Finally, Chodos' arguments are simply and clearly wrong and unwise. He would have this Court order that a bankruptcy court's "jurisdiction always terminates

when the bankrupt has returned to solvency." (Petition, p. 17.) Such a rule would not only be contrary to well settled law, but would violate strong federal policy in favor of allowing bankruptcy courts to closely monitor the fees paid to an attorney in contemplation of a bankruptcy case and retain jurisdiction to supervise the fees paid to debtor's counsel after the dismissal of a bankruptcy case.

REASONS FOR DENYING THE WRIT

I. CHODOS IMPROPERLY MAKES ARGUMENTS FOR THE FIRST TIME IN THIS COURT

Chodos argues, for the first time in this case, for an absolute rule that a bankruptcy court's jurisdiction over any matter related to the debtor's affairs must always terminate when the debtor has returned to solvency, to avoid "encroaching on the powers reserved to the states under the Tenth Amendment." (Petition, p. 11-12.) In the hundreds of pages of briefs he filed in support of his arguments in the three courts below, Chodos never argued that the U.S. Constitution mandated such a rule, which has become the cornerstone of his petition to this Court.[2] This, alone, is grounds for denying the petition.

[2] In the courts below, Chodos made a variety of arguments regarding why dismissal of the bankruptcy court's § 329 order was warranted, including the fact that STN had returned to solvency. However, Chodos never argued for an inflexible rule on the basis that anything less would be an encroachment on state powers. In addition, Chodos never argued for a mandatory rule that spells out when a bankruptcy court's jurisdiction

This Court has repeatedly held that it will exercise jurisdiction over federal claims not raised below only in "exceptional cases." *See Hoover v. Ronwin*, 466 U.S. 558, 104 S.Ct. 1989, 1998 (1984), *reh'g denied*, 467 U.S. 1268 (1984); *Heckler v. Campbell*, 461 U.S. 458, 103 S.Ct. 1952, 1958 n.12 (1983); *Delta Air Lines, Inc. v. August*, 450 U.S. 346, 362 (1981); *McGoldrick v. Compagnie Generale Transatlantique*, 309 U.S. 430, 434 (1940); *Duignan v. United States*, 274 U.S. 195, 200 (1927).

Chodos' challenge to the bankruptcy court's jurisdiction is not an exceptional case. It is common for a bankruptcy court to exercise jurisdiction over matters after the dismissal of the bankruptcy. *See In re Franklin*, 802 F.2d 324, 326 (9th Cir. 1986) (after dismissal of a bankruptcy case, a bankruptcy court has subject matter jurisdiction to construe its own orders "if they are to be held capable of monitoring whether those orders are ultimately executed in the intended manner"). Therefore, the fact that STN's bankruptcy case was dismissed is not unusual or relevant. Furthermore, neither is it unusual or relevant that STN returned to solvency. Indeed, insolvency is not even a prerequisite to the commencement of a bankruptcy case. *See, e.g., In re Hulse*, 66 B.R. 681, 683 (Bankr. M.D. Fla., 1986) ("[i]t should be noted that neither insolvency nor inability of the Debtors to pay their debts is a prerequisite to seeking any form of relief under the Bankruptcy Code"); *In re Johns-Manville Corp.*, 36 B.R. 727, 732 (Bankr. S.D.N.Y. 1984) ("it should be noted that neither Section

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comes to an end or under what circumstances a bankruptcy court can retain jurisdiction.

109 nor any other provision relating to voluntary petitions by companies contains any insolvency requirement").

Thus, because insolvency is not even a prerequisite to the commencement of a bankruptcy case, and bankruptcy courts exercise jurisdiction as a matter of course after the dismissal of bankruptcies, a rule that jurisdiction must cease upon the dismissal of the bankruptcy case and the debtor's return to solvency makes no sense. However, proponents of such a rule should propose it to the bankruptcy court, the district court and in the court of appeals before seeking review in this Court. There is no reason for this Court to address Chodos' new theory without the benefit of any analysis of the question by any of the three courts below. For this reason, the petition should be denied.

II. THERE IS NO CONFLICT IN DECISIONS JUSTIFYING REVIEW

Chodos concedes that there is no conflict in decisions justifying his petition for writ of certiorari. (Petition, p. 11.) To the contrary, the courts of appeal agree that bankruptcy courts should have discretion to retain jurisdiction after the bankruptcy has been dismissed where such jurisdiction is supported by economy, fairness, convenience and comity. *See, e.g., In re Carraher*, 971 F.2d 327, 329 (9th Cir. 1992); *Matter of Querner*, 7 F.3d 1199, 1202 (5th Cir. 1993); *In re Morris*, 950 F.2d 1531, 1535 (11th Cir. 1992); *In re Smith*, 866 F.2d 576, 580 (3rd Cir. 1989); *see also Chapman v. Currie Motors, Inc.* 65 F.3d 78, 81 (7th Cir. 1995), *reh'g en banc denied*, 1996 U.S. App. LEXIS 549 (7th

Cir. Jan. 12, 1996). There is no conflict in the circuits justifying review.

III. THERE IS NO IMPORTANT FEDERAL QUESTION TO REVIEW

Chodos also does not articulate any important federal question to review. Nor does he articulate why it is important for the Court to take away a bankruptcy court's discretion and to establish an inflexible rule regarding when jurisdiction should be retained.

Instead, relying on *Celotex Corp. v. Edwards*, ___ U.S. ___, 115 S.Ct. 1493, 1499 (1995), Chodos makes general references to a danger of overreaching by the bankruptcy court's "limitless" jurisdiction. (Petition, p. 10.) While it is true that bankruptcy courts should not have unlimited jurisdiction, in this context they do not. To the contrary, their jurisdiction is limited in a variety of ways by statute and by common law. For example, § 349 provides that, except for good cause, certain orders of the bankruptcy court will be automatically vacated upon dismissal of the bankruptcy. (Petition, A40.) In addition, bankruptcy courts are limited by consideration of the four factors discussed above in determining whether to retain jurisdiction after a dismissal.

Chodos also suggests that without a mandatory rule, bankruptcy courts will infringe on states' rights. (Petition, p. 11-12.)[3] This concern is baseless. Bankruptcy

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[3] In support of this argument Chodos cites to a number of opinions by the Court regarding states' rights. *See Younger v.*

courts' discretion in exercising jurisdiction is subject to several limitations, which would prevent any such interference. As a practical matter, bankruptcy courts will not go out of their way to retain jurisdiction (and increase their workload) unless it is necessary, efficient or fair to do so. Indeed, as noted by the court of appeal, the situation here is similar to the district court's exercise of jurisdiction over pendent state claims upon dismissal of all federal claims. (Petition, A30.) *See* 28 U.S.C. § 1367; *United Mine Workers v. Gibbs*, 383 U.S. 715, 725-26, 86 S.Ct. 1130 (1966) (pendent jurisdiction based on considerations of comity, economy, fairness and convenience); *Harrell v. 20th Century Ins. Co.*, 934 F.2d 203, 205 (9th Cir. 1991) (same). In that context, experience shows that district courts are not clamoring to retain jurisdiction and to improperly usurp the proper role of the state courts.

Ultimately, Chodos fails to justify a rule that always ousts bankruptcy courts of jurisdiction after dismissal where the debtor returns to solvency. In fact, by proposing such a rule, Chodos ignores the important reasons – economy, comity, fairness and convenience – why the bankruptcy court should be able to retain jurisdiction over some claims, whether or not the debtor is solvent or the bankruptcy is dismissed.[4]

Harris, 401 U.S. 37, 44 (1971); *United Mine Workers v. Gibbs*, 383 U.S. 715, 726 (1966); and *Erie R. Co. v. Tompkins*, 304 U.S. 64, 79 (1938). For the reasons discussed below, the concern addressed by these cases is inapplicable here.

[4] In fact, Chodos' current position is inconsistent with his position in the court of appeal, where he argued that judicial economy, convenience, fairness and comity weighed against retention of jurisdiction. Having lost that argument, Chodos

In considering comity, bankruptcy courts are able to determine whether the claims require interpretation of state law. When an adversary proceeding contains claims under the Bankruptcy Code, it makes sense for the bankruptcy court to maintain jurisdiction. If the bankruptcy court cannot retain jurisdiction after dismissal, the complainant may be left with no remedy at all. *See, e.g., In re Wood,* 210 U.S. 246, 256 (1908) (regarding § 60d of the Bankruptcy Act of 1898, "the bankruptcy act confers no jurisdiction upon a state court to entertain an application of the trustee, or of a creditor to reduce the provision made to counsel; that jurisdiction is given alone to the district court of the United States in administering the property").

"Judicial economy looks to preserve energies already invested by the parties and the court in the proceedings." *In re Stardust Inn, Inc.,* 70 B.R. 888, 891 (Bankr. E.D. Pa. 1987). A mandatory rule that the bankruptcy court loses all jurisdiction after dismissal of the bankruptcy and solvency of the debtor, would result in duplication of efforts where an adversary proceeding has already progressed through phases of litigation in the bankruptcy court and the bankruptcy judge has become familiar with the case. *See, e.g., In re Pocklington,* 21 B.R. 199, 202 (Bankr. S.D. Cal. 1982) (after dismissal of bankruptcy case, bankruptcy court retained jurisdiction over adversary proceeding where court "had already heard testimony and received documentary evidence").

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now asks the Court to simply throw out these factors and establish a new rule.

Finally, bankruptcy courts should be allowed to consider whether retention of jurisdiction would be fair and convenient for the parties. For example, where, as here, the opposing party voluntarily submitted to the jurisdiction of the bankruptcy court, retention of jurisdiction over claims affecting that party would be fair. Moreover, if going forward with the adversary proceeding in the bankruptcy court is more convenient than dismissing it so that it can be litigated in state court, it would be senseless to dismiss the adversary proceeding simply because the bankruptcy was dismissed.[5]

IV. THE PETITION FAILS TO IDENTIFY A REASON WHY THIS COURT SHOULD IGNORE IMPORTANT FEDERAL POLICY

The petition also should be denied because the rule proposed by Chodos directly conflicts with strong federal policy to protect creditors of the estate and vulnerable debtors against overreaching by attorneys representing troubled companies. The Court, in dealing with the statutory precursor to § 329 of the Bankruptcy Code (§ 60d of

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[5] An inflexible rule requiring dismissal of an adversary proceeding when the bankruptcy is dismissed would lend itself to manipulation by the parties. *See, e.g., Chapman v. Currie Motors, Inc.* 65 F.3d 78, 81 (7th Cir. 1995) (recognizing the danger created if a debtor in an adversary proceeding is able to bounce the proceeding out of federal court by procuring the dismissal of the underlying bankruptcy proceeding, for example by defaulting on a Chapter 13 payment scheme). Thus, the parties and the courts are better served by the existing process that allows consideration of a variety of factors to determine whether jurisdiction is appropriate.

the Bankruptcy Act of 1898), explained the rationale for closely monitoring the fees paid to an attorney "in contemplation of a bankruptcy case." *See In re Wood*, 210 U.S. 246, 251 (1908) (recognizing that Section 60d addressed the temptation of a failing debtor to deal too liberally with his property in employing counsel to protect him in view of financial reverses and probable failure, the Court upheld a bankruptcy court's jurisdiction to require repayment of fees paid prepetition to debtor's counsel) (emphasis added). *See also Conrad, Rubin & Lesser v. Pender*, 289 U.S. 472, 477 (1933) ("[t]he manifest purpose of [§ 60d] is . . . to provide a restraint upon opportunities to make an unreasonable disposition of property through arrangement for excessive payments for prospective legal services").

Following the enactment of the Bankruptcy Code, courts have acknowledged that the same concerns articulated by the Court in *Wood* and *Conrad, Rubin & Lesser* constitute the foundation for § 329 of the Bankruptcy Code. *See In re Mills*, 170 B.R. 404, 408 (Bankr. D. Ariz. 1994) ("Compensation of the debtor's attorney is [ ] subject to close scrutiny in order to 'preserve the creditor protection provisions of the bankruptcy laws' and because of 'serious potential for overreaching by the debtor's attorney' in the bankruptcy context."). *See also In re Walters*, 868 F.2d 665 (4th Cir. 1989) ("The provisions [of § 329 and Federal Rule of Bankruptcy Procedure 2017] are meant to protect the creditors *'and the debtor* against overreaching' by attorneys.") (emphasis in original); *In re Dixon*, 143 B.R. 671, 676 (Bankr. N.D. Tex. 1992) ("In enacting § 329, Congress has reaffirmed the statement of policy set out in *Conrad, Rubin & Lesser v. Pender, supra.*").

Thus, § 329 was enacted to protect against the very abuse that occurred with respect to Chodos' dealings with STN. The State Lawsuit was one of STN's major assets. In order to keep its state court counsel from abandoning STN upon the filing of its bankruptcy case, STN was maneuvered into making a large advance to Chodos on questionable terms.[6] Pursuant to the policies behind § 329 and Rule 2017, the bankruptcy court ordered that the funds be returned to STN.

The goal of § 329 and Rule 2017, to prevent overreaching by the debtor's attorney, would be undermined if the dismissal of a bankruptcy case or the solvency of the debtor eliminated the jurisdiction of the bankruptcy court to review prepetition fee payments to the debtor's attorney. Indeed, many courts have held that a bankruptcy court's jurisdiction to supervise the fees paid to debtor's counsel continues after the dismissal of a bankruptcy case. *See, e.g., Post v. Ewing*, 119 B.R. 566, 568-69 (S.D. Ohio 1989) (holding that, irrespective of dismissal of case, bankruptcy court had jurisdiction to enter order requiring attorney to refund fees to debtors, after attorney had failed to follow court's prior instructions to do so); *In re Fox*, 140 B.R. 761, 762 (Bankr. D.S.D. 1992) (holding that court had jurisdiction over final fee application filed by debtor's counsel, irrespective of dismissal of debtor's chapter 12 case).

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[6] Rule 2017 of the Federal Rules of Bankruptcy Procedure was also designed "to protect the creditors of the estate and the debtor against overreaching by an officer of the court who is in a peculiarly advantageous position to impose on both the creditors and his client." Advisory Committee Note to Rule 2017 (citations omitted).

The rationale courts give for post-dismissal jurisdiction to supervise fees paid to debtor's counsel is that the bankruptcy "court's duty of oversight of fee matters embraces a broad supervisory power over any fees charged in contemplation of, or in connection with, a bankruptcy case by both attorneys and lay persons, as provided in the Bankruptcy Code and Rules." *See e.g., In re Fricker*, 131 B.R. 932, 938 (Bankr. E.D. Pa. 1991). It is irrelevant whether creditors or the bankruptcy court have an interest in the fees paid by the debtor to an attorney. *See In re Tennessee Valley Center for Minority Economic Development, Inc.*, 99 B.R. 845 (Bankr. W.D. Tenn. 1989) (after the voluntary dismissal of a chapter 11 case, the bankruptcy court retained jurisdiction and ordered debtor's attorney to restore any unearned portion of a $5,000 retainer paid prepetition). *See also In re Samford*, 102 B.R. 724, 726-27 (Bankr. E.D. Mo. 1989), *aff'd*, 125 B.R. 230 (E.D. Mo. 1989) (holding that dismissal of bankruptcy case did not eliminate court's duty to supervise fees paid to debtor's state court counsel); *In re Lowe*, 97 B.R. 547, 548-49 (Bankr. W.D. Mo. 1987) (holding that court required to determine reasonableness of attorneys' fees after dismissal of bankruptcy case).

The rule proposed by Chodos would seriously hinder the bankruptcy court's ability to review fees paid by the debtor in cases similar to those described above and would undermine the strong policy in favor of such review.

CONCLUSION

This case presents no conflict in decisions or any important federal question for this Court. Moreover, the proposed rule conflicts with well-established federal policy which protects debtors and their creditors from overreaching by attorneys before and after bankruptcy filings. The Petition should therefore be denied.

Respectfully submitted,

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